

STATE OF NEW YORK

STATE TAX COMMISSION

In the ~~Matter~~ of the Petition

of

TRIEBITZ ORIGINALS, INC.

DECISION

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1979
through ~~May~~ 31, 1982.

Petitioner, Triebitz Originals, Inc., 2122 86th Street, Brooklyn, New York 11214, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1979 through ~~May~~ 31, 1982 (File No. 42167).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 11, 1986 at 10:45 A.M., with all documentation submitted by November 26, 1986. Petitioner appeared by Kudler & Berner (Marc Baboff, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (~~Angelo A. Scopellito~~, Esq., of counsel).

ISSUE

Whether petitioner ~~is~~ liable for additional sales tax due to its inability to substantiate nontaxable sales ~~for~~ the audit period.

FINDINGS OF FACT

1. On November 20, 1982, the Audit Division issued to petitioner, Triebitz Originals, Inc. ("~~Triebitz~~"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1979 through ~~May~~ 31, 1982 ("the audit period"). Said notice assessed taxes due in the sum of

\$18,418.04, penalty of \$3,952.13 and interest of \$3,705.44, for a total amount due of \$26,075.61.

2. Petitioner operates a retail and wholesale business dealing primarily in women's shoes in Brooklyn, New York.

3. The assessment was the result of an audit by the Audit Division of the business operations of petitioner for the audit period. Pursuant to the auditor's request on and before August 9, 1982, petitioner produced some books and records, to wit, sales tax returns, Federal income tax returns for the year ended June 1980, depreciation schedules, a cash receipts journal and a check disbursements journal. However, petitioner did not produce complete sales invoices, resale certificates, complete bank statements or a Federal income tax return for the fiscal year ended June 1981.

4. Subsequent to the auditor's initial visit to petitioner's place of business, the Audit Division was notified on October 7, 1982 that petitioner's place of business was burglarized and that one of the casualties was the sales invoices for the entire audit period. A police report verifying said burglary was not produced.

5. Based upon the limited information which was acquired from petitioner, the auditor conducted a gross sales reconciliation, examining the gross sales from the sales tax returns filed during the audit period, the sales as reflected in receipts and the purchases as reflected in disbursements. There was a very small discrepancy between gross receipts reflected in the books and records produced by petitioner and the gross sales listed on the sales tax returns for the audit period. The Audit Division also reconciled taxable sales per receipts with those stated on the sales tax returns, finding virtually no discrepancy.

6. With the exception of one customer, Concoctions, Ltd., the Audit Division disallowed all other nontaxable sales stated in petitioner's sales tax returns because no substantiation for said nontaxable sales was produced. The total reported nontaxable sales of petitioner amounted to \$330,604.00 for the entire audit period. The Audit Division reduced that amount by sales to Concoctions, Ltd. totalling \$22,481.00, and also made a reduction for general income, consisting of insurance, rent and loans in the sum of \$80,602.00 to arrive at a final figure for nontaxable sales of \$227,521.00. This figure, without further substantiation, was assumed to be additional taxable sales and the Audit Division applied the proper sales tax rate to the additional taxable income in each quarter of the audit period to arrive at additional tax due of \$18,418.04

7. The Audit Division found no fixed asset acquisitions during the audit period and no further additional tax due.

8. Subsequent to hearing, petitioner submitted numerous cancelled checks, copies of bank deposits, a handwritten list of stores with which petitioner did business during the audit period and several pages of handwritten notes attempting to correlate the deposits listed on the bank records with sales for resale. However, the petitioner was unable to produce resale certificates substantiating its claimed nontaxable sales during the audit period.

CONCLUSIONS OF LAW

A. That Tax Law § 1105(a) provides that the receipts from every retail sale of tangible personal property shall be subject to a sales tax, except as otherwise provided in Article 28 of the Tax Law.

B. That Tax Law § 1101(b) provides, in pertinent part, that:

"(b) When used in this article for purposes of the tax imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(4) Retail Sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property,...."

C. That the Regulation promulgated pursuant to Tax Law § 1101(b)(4) at 20 NYCRR § 526.6(c)(1) provides that:

"Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale and therefore, not subject to tax until he has transferred the property to his customer."

D. That the Regulations further state that a resale certificate is one used to claim exemption from tax on purchases of tangible personal property or services which will be resold or transferred to a customer when said personal property or services is for resale. It **is** required that each vendor accepting a resale certificate must, for verification purposes, maintain a method of associating a sale made for resale with the resale certificate on file. (20 NYCRR § 532.4[d][4].)

E. That petitioner failed to produce sales invoices and corresponding resale certificates for the nontaxable sales claimed on each sales tax

return filed during the audit period, with the exception of one customer, for which petitioner was given credit.

F. That, since petitioner did not pay its tax as determined by the Audit Division within the time required by Tax Law § 1136(b), and **no** reasonable cause appears herein, it **is** liable for penalty pursuant to Tax Law § 1145(a).

F. That the petition **of** Triebitz Originals, Inc. is denied and the Notice **of** Determination and Demand for Payment **of** Sales and Use Taxes Due issued on November 20, 1982 **is** sustained, together with penalties assessed and such additional interest as may be lawfully owing.

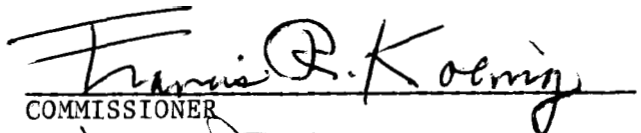
DATED: Albany, New York

STATE TAX COMMISSION

FEB 20 1987



PRESIDENT



COMMISSIONER



COMMISSIONER